DR CHANDRA MUZAFFAR

v.

UNIVERSITI MALAYA

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING SUMMONS NO: R2-25-36-1999]
9 FEBRUARY 2002

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Legitimate expectation - Non-renewal of applicant's contract of employment - Whether applicant had legitimate expectation of continued employment until confirmation as permanent staff member - Whether applicant had legitimate expectation to be heard before decision was made not to renew contract - Whether there was overriding public interest to frustrate applicant's legitimate expectations*

The applicant's service as a professor in the University of Malaya ('UM') came to an end when UM decided not to renew his contract of employment. The applicant made the instant application for *certiorari* claiming that he had been dismissed from employment without being accorded a right of hearing. Alternatively, that UM did not give him the benefit of continued employment after inducing him to leave his permanent employment with University Science Malaysia ('USM'). The applicant claimed that the Deputy Chancellor (Academic Affairs) of UM had made representations to him that he would eventually be made a permanent staff member of UM and that his employment on a year to year basis was only due to administrative requirements. The applicant claimed that he had a legitimate expectation of continued employment as a professor of UM until he retired and a legitimate expectation to be heard before UM made its decision not to renew his contract.

Held:

[1] The applicant's argument that he was a member of the Education Service under the Federal Constitution and therefore entitled to constitutional protection under art. 135(2) of the Federal Constitution was without merit. Firstly, from the facts he was not dismissed from service. Secondly, the applicant was in the service of UM, a statutory entity, separate from public services which included the Education Service. (p 453 f-i)

[2] A public body which had lawfully entered into a contract is bound by it and has the same power under it as any other contracting party but in exercising its contractual power, it might also be restricted by its public law responsibilities. Therefore, a decision taken by a public body cannot be treated as purely in the realm of contract. It might at the same time be governed by statute. That principle would have to be viewed in the context with what the applicant claimed was a legitimate expectation to be heard before UM made its decision not to renew his contract and a legitimate expectation to continue in service. (p 456 b-c)

[3] The court accepted the very plausible version of the applicant that representations were made to him that he would head the relevant Centre until he retired and that it was just an administrative requirement of UM that he would be appointed as a contract professor serving on a year to year basis until he was confirmed as a permanent staff of UM. When someone of international statute in the academic world is head-hunted to start up and head a department which is entirely new in concept and which will bring prestige to the University, the probabilities favour that such representations have been made. (p 466 a-d)

[4] The applicant had no enforceable right of being made a permanent staff of UM since the relevant university authority had not exercised its power to appoint him on a permanent basis. At the very least, the applicant had a legitimate expectation of continued employment as a contract professor until he was confirmed as a permanent staff member. While there was a concomitant legitimate expectation to be heard as to why the contract could not be renewed on a year to year basis until he was so confirmed, the benefit of being confirmed for another year should be given unless there was an overreaching public interest frustrating the legitimate expectation of the applicant. However, the reasons advanced by UM did not show that there was an overriding public interest for the University to renege on its representations to the applicant. (pp 466 h-i, 467 a-c & 468 c-d)

[5] The applicant's contention that the non-renewal of the contract was for a collateral reason which was political in nature, could not stand as it was based on a surmise. Also, no evidence had been offered by the applicant to justify the court making such an interference that his contract was terminated for a political reason. (p 467 h-i)

[6] The legitimate expectation of the applicant to be made a permanent staff could not be fulfilled and enforced because the power to place him on a permanent basis had not been exercised by the relevant authority. It followed that that could not form the basis for a monetary

claim till the date he retired. The applicant had been denied the legitimate expectation of being continued in service for another year. It would be fair and just to compensate him for that one year which he had expected and which was not given to him. (p 476 d-e)

[Certiorari to issue to quash decision of UM not to renew contract of applicant; compensation accordingly.]

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374 ***(refd)***

Eng Mee Fong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] 1 CLJ 85; [1981] CLJ (Rep) 53 ***(refd)***

In re Findlay [1985] AC 318 ***(refd)***

John Peter Berthelsen v. Director General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 ***(refd)***

Lori Malaysia v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd [1999] 3 CLJ 65 ***(refd)***

Malloch v. Aberdeen Corporation [1971] 2 All ER 1278 ***(refd)***

McInnes v. Onslow-Fane & Anor [1978] 1 WLR 1520 ***(refd)***

O'Reilly v. Mackman [1963] 2 AC 237 ***(refd)***

R v. Ministry for Agriculture, Fisheries and Foods, ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 ***(refd)***

R v. North and East Devon HA, ex p Coughlan [2000] 2 WLR 622 ***(refd)***

R v. Secretary of State for the Home Department, ex p Hargreaves [1997] 1 WLR 906 ***(refd)***

R v. Secretary of State for Transport, ex p Richmond upon Thames London BC [1994] 1 WLR 74 ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***

Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch 149 ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 2 CLJ 771 ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 ***(refd)***

Webster v. Auckland Harbour Board [1983] 142 CR 646 ***(refd)***

Legislation referred to:

Constitution of the University of Malaya (PU(A) 107/1997), ss. 2, 6(1), 15(1), 23, 48(1)(d), (2), (4)

Courts of Judicature Act 1964, s. 25(2)

Federal Constitution, arts. 132(1)(h), 135(2), 141A

Rules of the High Court 1980, O. 53 rr. 1(3), 2(3)

Universities and University Colleges Act 1971, ss. 2, 7, 25(1), (2)

Other source(s) referred to:

Michael Supperstone QC & James Goudie QC, *Judicial Review,* 2nd edn, 5.31, 5.32, 8.25, 8.30

PP Craig, *Substantive Legitimate Expectations in Domestic and Community Law,* 1996 Cambridge Law Journal 289

For the applicant - Tommy Thomas (Ambiga Sreenevasan); M/s Skrine & Co
For the respondent - Wong Kian Kheong (BH Yap); M/s Lee Hishammuddin

Reported by Usha Thiagarajah

JUDGMENT

KC Vohrah J:

Brief Facts

The applicant's service as a professor in the University of Malaya (UM) came to an end when UM decided not to renew his contract of employment when it expired on 28 February 1999.

The applicant in this *certiorari* application complains that he had been dismissed from employment and had not been accorded a hearing before he was dismissed.

Alternatively, he says that UM did not give him the benefit of continued employment which was founded on the representations of UM to him, and which induced him to leave University Science Malaysia (USM) where he was a permanent staff, that the applicant would be made a permanent staff of UM although he was to be employed on a year to year basis because of administrative requirements; that he had a legitimate expectation to continue to be employed as a professor at UM until he retires and that there was also a legitimate expectation to be heard before UM made its decision not to renew his contract and these legitimate expectations had been breached.

In regard to the first complaint that he was dismissed he says that he had a constitutional right to livelihood by being a member of one of the Public Services, the Education Service, and that he was entitled to procedural fairness in that he should have been given an opportunity to be heard before he was dismissed; and if he was not a member of the Public Services, he was an employee of a public authority and was also entitled to procedural fairness before he was dismissed.

In regard to the legitimate expectation issue, he states that in 1996 he was persuaded by the Deputy Chancellor (Academic Affairs) of UM, Professor Dr. Osman Abu Bakar, during several meetings, to leave USM where he was a permanent staff to join UM as the Director of the Centre for

Civilisation Dialogue as a contract professor which UM proposed to establish and it was represented to him by Professor Osman, *inter alia*, that his status as a contract professor was an administrative requirement and that it would be a formality before he became confirmed as a permanent member of the University's academic staff. UM in fact had renewed his contract of employment for another year and had given him staff quarters. The decision of the University, therefore, not to further renew his contract of employment was inconsistent with the representations made by Professor Osman to him; he has a legitimate expectation to continue to be employed by UM in view of the express representations made to him by Professor Osman and he had a legitimate expectation to be heard or consulted by UM before the decision not to renew his employment was made.

The Leave Application

The applicant applied *ex parte* to the High Court for leave to apply for an order of *certiorari* to quash the decision of UM not to renew his contract of employment. My learned brother, Azmel J, who heard the leave application, invited the views of UM, the respondent, and the attorney general (who was given notice under the then O. 53 r. 1(3)) on the leave application. UM, according to the written submission in the court file, objected to leave being given on the ground that there cannot be judicial review of the decision of UM not to renew the applicant's contract of employment as it was a decision made under a contract and was a purely private law matter. The view of the attorney general (also seen from the written submission) was that there is an arguable case for judicial review in that the contract may not be an exclusively private law contract but one which incorporates elements of public law and that on the basis, *inter alia*, of *Webster v. Auckland Harbour Board* [1983] 142 CR 646 it may well be arguable that the applicant had a legitimate expectation of a hearing by UM before the University decided not to renew his contract of employment.

My learned brother Azmel J granted the applicant leave to apply for an order of *certiorari* to remove to the High Court for the purpose of being quashed the decision of UM and also granted him leave to apply for an order of *mandamus* directing UM to make a decision to re-instate the applicant as Director and Professor of the Centre of Civilisational Dialogue without any loss of benefit. The court also gave an order that the applicant be at liberty to seek "the appropriate order/relief from the court pursuant to para. 1 of the Schedule to the Court of the Judicature Act 1964 and s. 25 thereof".

The appellate and special powers division of the High Court was reorganised when Azmel J was transferred to another division and the number of judges in the division was reduced to two. The matter was allocated to my court for hearing and joined the queue of cases already scheduled for hearing. In support of the alternative prayer for an appropriate order or relief an affidavit was filed in my court to show how much the applicant had lost by way of monetary benefit every month up to his retirement age of 55. I allowed the use of the affidavit over the objection of UM and ruled that that UM could file an affidavit in reply to that affidavit in view of the fact that Azmel J had given the applicant liberty to seek an appropriate order or relief from the court as earlier stated.

Whether Applicant Member Of Education Service Under Federal Constitution

While the University readily agrees that the applicant, having been employed by a statutory body, ie, the University of Malaya, was afforded as an employee a special status under the statutory regime, the University says that the fixed term contract was not caught by the special status as the contract was an ordinary contract of employment and it was a simple case of his term of employment having come to an end and in any event he had not asked for its renewal. The University disputes that the applicant was a member of the Education Service under the Constitution.

One of the contentions of the applicant was that he had been dismissed from service; that he was a holder of a public office, ie, the Education Service, within the meaning of art. 132(1)(h) of the Federal Constitution and that he is therefore entitled to constitutional protection under art. 135(2) of the Federal Constitution which provides that no member of such a service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard. The argument is without merit. Firstly, it has to be noted from the facts that he was not dismissed from service. Secondly, the applicant was employed by the University of Malaya which is a public authority created and incorporated by statute, the University of Malaya Act 1961 (the 1961 Act). The Universities and University Colleges Act 1971 (the 1971 Act) through s. 25(1) provides that the University of Malaya established under the 1961 Act "shall be deemed to be a university established" under the 1971 Act under s. 25(2) and the provisions of the 1961 Act "shall subject to the provisions of this Act continue in force for the purposes of the University". In other words the applicant was in the service of the University of Malaya, a statutory entity, separate from the public services (which includes the Education Service) whose members are under the jurisdiction of the Education Service Commission constituted under art. 141A of the Federal Constitution.

Contract Of Employment Entered Into By Public Body Restricted By Public Law Responsibilities

I shall next deal with the issue whether it was a simple contract of employment between the University and the applicant which the University contends it is.

Under s. 7 of the 1971 Act the University of Malaya may exercise all the powers conferred on it by the Act or its Constitution. Under s. 2, "the Constitution" means the Constitution of the University of Malaya contained in the Schedule to the 1961 Act, as amended from time to time. The present Constitution of the University of Malaya is as found in PU(A) 107 of 1997 which came into force on 1 March 1997 as amended by PU(A) 356 of 1997, PU(A) 466 of 1997 (as from 1 March 1997) and PU(A) 511 of 1999 (as from 21 November 1997).

The relevant sections of the said Constitution for our purposes are those relating to the appointment and dismissal of "employees of the University" defined under s. 2 as any person employed by the University "... and including an officer, teacher and staff of the University". A "teacher" is defined in s. 2 as a person appointed to be a teacher in accordance with the Constitution, including "a senior professor, professor, reader, associate professor, senior lecturer, lecturer, assistant lecturer, language and matriculation teacher, and tutor." The word "officer" is defined in s. 2 to include "the Chancellor, Pro-Chancellor, Vice-Chancellor, Deputy Vice-Chancellor, Dean and Deputy of a Faculty, ... and any holder of any office created by this Constitution or Statute".

Under s. 6(1) of the Constitution, subject to the provisions of the Constitution, the University shall have the following powers:

(a) ...

...

(g) to institute Chairs, professorships, lectureships, and other posts and offices, and to make appointments thereto;

...

(p) to appoint and promote employees of the University;

...

(r) to regulate the conditions of service of the employees of the University, including schemes of service, salary scales, leave and discipline;

...

(m) to do all such acts and things, whether or not incidental to the powers aforesaid as may be requisite in order to further improve the instruction, research, finance, administration, welfare of any discipline, in the University.

Under s. 15(1) the "Authorities of the University shall be the Board, the Senate, the Faculties, the Centres, the Academies, the Institutions, the Studies Committee, the Selection Committee, the Student Welfare Committee and such other bodies as may be prescribed by Statute as Authorities of the University". Under s. 23 for the purposes of appointment to a chair (which under s. 2 means the post of professor as holder of a chair) and appointment and promotion to the posts of senior professors and professors a Selection Committee comprising certain specified members is provided for.

Under s. 48(1)(d) all persons employed or who are to be employed for a year or less shall be appointed by an officer authorised by the "University Management" (defined under s. 48(4) and which includes the Vice-Chancellor, all the Deputy Vice-Chancellors, the General Administrative Manager, the Financial Controller and the Chief Librarian). In 1998 the applicant's contract was renewed for one year and this was obviously done under s. 48(1)(d).

It is further provided under s. 48(2) that every person employed by the University shall hold office on such terms and conditions as may be specified by the Board or as may be so prescribed by statutes and rules and the terms and conditions so specified shall include a provision (apart from matters relating to teaching, examining, invigilating and other similar duties) that the employment is subject to the provisions of the Constitution and to the provisions of all statutes, acts and regulations in force on the date of the commencement of his employment.

It has to be pointed out that when the applicant received his letter of office from the University this was before the coming into force of PU(A)107 of 1997. At that time the letter was sent teachers were appointed by the Council of the University on the advice of the Board of the Selection Committee under PU(A) 104 of 1972.

It will be seen that this is not a straightforward case of master and servant between UM and the applicant. There is the element of public employment which is supported by statute and if this was a case of dismissal by UM, a public body of its employee, the applicant, then "there may be procedural requirements to be observed and failure to observe them may result in a dismissal being declared to be void" (see the House of Lords case of *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278 at p. 1294; see

also the Federal Court case of *Fadzil bin Mohamed Noor v. Universiti Teknologi Malaysia* [1981] 1 CLJ 85; [1981] CLJ (Rep) 53). As I have observed earlier this is not a case of dismissal from service. The applicant's status was that of an employee whose contract of service had come to an end and which was not renewed. On the other hand there is the principle that while a public body which had lawfully entered into a contract is bound by it and has the same power under it as any other contracting party, however, in exercising the contractual power it might also be restricted by its public law responsibilities; thus a decision taken by a public body cannot be treated as purely in the realm of contract; it might at the same time be a decision governed by statute *Webster v. Auckland Harbour Board* [1983] 142 CR 646. This principle will have to be viewed in the context with what the applicant claims was a legitimate expectation to be heard before UM made its decision not to renew his contract and a legitimate expectation to continue in service.

Legitimate Expectations

The applicant's argument is that by being an employee of a statutory body he was afforded a special status under the statutory regime and because of the representations made to him by Professor Osman on behalf of the University that his status as a contract professor was an administrative requirement and that it would be a formality before he became confirmed as a permanent member of the University's academic staff he was in possession of the legitimate expectations to be heard before the University decided not to renew his contract and also to continue in service till he retired.

There are now two dimensions to the concept of legitimate expectations ie, procedural legitimate expectations and substantive legitimate expectations. In this case we will be more concerned whether there are substantive legitimate expectation aspects generated by the facts of the case.

The term "legitimate expectation" was first used by Lord Denning in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149 and this case has been referred to by our Supreme Court in *John Peter Berthelsen v. Director General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160. Abdoolcader SCJ speaking for the court had this to say about the concept and the role played by the possession of a legitimate expectation (that of a procedural dimension):

> The Court of Appeal in England held in *Schmidt and Another v. Secretary of State for Home Affairs* that no duty existed to give an alien an opportunity of being heard before a decision was made refusing an application for an extension of permission to remain in the United Kingdom.

> Lord Denning M.R. emphasised that the alien had 'no right' and 'no legitimate expectation' of being allowed to stay. However, he also said that the alien had not been treated unfairly since he had an opportunity of making representations. Lord Denning describes (at page 170) an administrative body as being bound, in proper cases, to give a person affected by its decision an opportunity of making representations if, although lacking any right or interest, that person yet possesses 'some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.' By way of illustration he contrasts the case of an alien whose residence permit has expired with that of another whose permit has expired with that of another whose permit is revoked before its expiry date; the latter possesses a legitimate expectation of being allowed to stay for the full term of the permit, and he alone has, in consequence, a legal right, in accordance with the principles of natural justice, to insist that his representations be considered before the making of any decision upon his deportation.

It will be noted that Abdoolcader SCJ then cited and went on to discuss in his judgment the concept of legitimate expectation in the context of *McInnes v. Onslow-Fane & Anor* [1978] 1 WLR 1520 and *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629. What was discussed was the concept of legitimate expectations of a procedural nature.

As has been pointed out by Michael Supperstone QC and James Goudie QC in their book *"Judicial Review"* (2nd edn) at 8.25 the concept of legitimate expectation has been widely adopted both in English courts and Commonwealth jurisdiction and that the House of Lords has recognised both in *O'Reilly v. Mackman* [1963] 2 AC 237 and in *In re Findlay* [1985] AC 318 that legitimate expectation would provide an applicant with *locus standi* in judicial review proceedings.

In respect of legitimate expectations of a substantive nature in England there was disagreement whether there was a doctrine of substantive legitimate expectations. Laws J in *R v. Secretary of State for Transport, ex parte Richmond upon Thames London BC* [1994] 1 WLR 74 rejected that there was such a doctrine while in *R v. Ministry for Agriculture, Fisheries and Foods, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 Sedley J was of the view that there was such a doctrine and there were precedents for such a doctrine (see PP Craig: *Substantive Legitimate Expectations in Domestic and Community Law* [1996] Cambridge Law Journal 289 for a discussion of the two decisions; see also Michael Supperstone and James Goudie: *Judicial Review* (2nd edn) 5.31, 5.32 and 8.30). The Court of Appeal in *R v. Secretary of State for the Home Department, Ex parte Hargreaves* [1997] 1 WLR 906 expressed that

Sedley's view was heresy. It decided the matter before it on *Wednesbury* (*Associated Provincial Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223) grounds.

In a recent case *R v. North and East Devon H.A., Ex parte Coughlan* [2000] 2 WLR 622 the Court of Appeal observed that the view expressed in *Ex parte Hargreaves* on substantive legitimate expectation was *obiter* and distinguished the case on other grounds.

The Federal Court case is a planning case with exceptional circumstances, *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd* [1999] 3 CLJ 65, establishes in Malaysia that the concept of legitimate expectation could (in appropriate cases) have an impact not merely on procedures but also on the substance of the decision.

In *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374, Lord Diplock considered the concept when seeking to define the ambit of judicial review and stated at p. 408 that for a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either:

> (i) he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do unless there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
>
> (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

It will not be out of place to refer to the judgment delivered by Lord Woolf in *Ex parte Coughlan* at pp. 652 and 653 which refers to the above:

> 77. ... In this country *Reg. v. Secretary of State for the Home Department, Ex parte Ruddock* [1987] 1 WLR 1482 and *Reg. v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337 were cited as instances of substantive legitimate expectations to which the courts were if appropriate prepared to give effect. Reliance was also placed, as we would place it, on Lord Diplock's carefully worded summary in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, pp. 408-409 of the contemporary heads of judicial review. They included benefits or advantages which the applicant can legitimately expect to be permitted to continue to enjoy. Not only did Lord Diplock not limit these to procedural benefits or advantages; he referred expressly to *In re Findlay* [1985] AC 318 (a decision in which he had participated) as an example of a case concerning a claim to a legitimate expectation – plainly

a substantive one, *albeit* that the claim failed. One can readily see why: Lord Scarman's speech in *In re Findlay* is predicated on the assumption that the courts will protect a substantive legitimate expectation if one is established; and Taylor J, so interpreted it in *Ex parte Ruddock* [1987] 1 WLR 1482. None of these cases suggests that the standard of review is always limited to bare rationality, though none developed it as the revenue cases have done.

In *Ex parte Coughlan* the applicant had been greviously injured in a road traffic accident. The applicant and seven comparably disabled patients were moved with their agreement from a hospital, which it was desired to close, to a purpose built facility, Mardon House. The health authority decided to close Mardon House and to transfer long-term general nursing care to the local authority although no alternative placement for the applicant was identified.

The Court of Appeal held (see para. 2 at p. 623) that if a public body exercising a statutory function made a promise as to how it would behave in the future which induced a legitimate expectation of a benefit which was substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power; that, in such circumstances, the court had to determine whether there was a sufficient overriding interest to justify a departure from what had previously been promised; that in view of the importance of the promise to the applicant in the case, the fact that it was limited to a few individuals and that the consequences to the health authority of honouring it were likely to be financial only, the applicant has a legitimate expectation that the health authority would not resile from its promise unless there was an overreaching justification for doing so; and that, in the circumstances, including the fact that the quality of the alternative accommodation to be offered to the applicant was not known, the closure decision was an unjustified breach of that promise which constituted unfairness amounting to an abuse of power.

Lord Woolf MR at p. 644 in discussing the role of the court in regard to concept of substantive legitimate expectation in respect of a High Court judgment which was on appeal observed:

Legitimate expectation – the court's role

55. In considering the correctness of this part of the judge's decision it is necessary to begin by examining the court's role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it

> could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success ...
>
> 56. What is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *In re Findlay* [1985] AC 318, p. 338, 'But what was their legitimate expectation?' Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *In re Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

Lord Woolf then discussed the three possible outcomes from the examination at p. 645:

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223).

(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.

(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural where authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take anew a different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

It will be noted that the third category is the most appropriate remedy to be considered in the context of our case.

Lord Woolf in *Ex parte Coughlan* having observed that the court having decided that the third category is appropriate that it has, when necessary, to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised continued at p. 646:

> Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract.

The Court of Appeal examined several authorities on the matter and at p. 654 Lord Woolf stated:

> 82. The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive's policy-making powers should not be trammeled by the courts: see *Hughes v. Department of Health and Social Security* [1985] AC 766, 788, per Lord Diplock. Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual date – in other words, as not ordinarily open to judicial review. The court's task – and this not always understood – is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exceptions (as was envisaged in *British Oxygen Co. Ltd. v. Board of Trade* [1971] AC 610 and as had happened in *Ex parte Hamble (Offshore) Fisheries Ltd.* [1995] 2 All ER 714), or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.

Was There Substantive Legitimate Expectation?

The University contends that there was no legitimate expectation on the part of the applicant and that the burden is on him to prove it. The applicant averred that in 1996 he was Senior Research Fellow and Associate Professor at the Centre for Policy Research, USM and was confirmed as a permanent member of the University. During 1996 the Deputy Vice-Chancellor (Academic Affairs) of UM, Professor Dato' Dr. Osman Bakar (Professor Osman), approached him to join UM. He had a few meetings with Professor Osman, with the first one held sometime in March 1996 during a conference at PJ Hilton. Professor Osman informed him at this first meeting that UM was proposing to establish a Centre for

Civilisational Dialogue, and that the University had the applicant in mind to be appointed as its first Director and Head. Professor Osman told him he had been head-hunted for the position because of his international standing in the academic community and that that would add credibility to the image of the Centre and the University.

The applicant stated that his initial response to Professor Osman was to inform him that he was very content with his position at USM and his involvement with JUST World Trust and that his family and he had been residing in Penang since 1970 and they were very comfortable there and he was most reluctant to be relocated. He also told him that one of his daughters was then studying in Penang and he had purchased a house in Penang which he was occupying. According to him, however, Professor Osman told him to seriously think about the offer and that he should not reject it out of hand.

The applicant referred to the second meeting which took place on 1 July 1996 at the Rumah Universiti Malaya when Professor Osman brought up the subject again. At this meeting Professor Osman informed him that UM was willing to appoint him as Professor and to increase his compensation package he was receiving from USM. His response was that he had not given much thought to UM's offer.

Then, according to the applicant, during a seminar in Penang on 11 and 13 October 1996 on "Alterative Politics in Asia" organised by JUST World, Professor Osman, who was one of the participants of the seminar, again brought up the subject with him and informed him that UM was very serious about its plan to set up the Centre and would very much like him to head it and that he should give an answer as soon as it was convenient. At this third meeting the applicant informed Professor Osman that he had seriously considered his offer and was prepared to accept it but needed a little more time to make the final decision.

The applicant stated that among the factors that were disclosed to him by Professor Osman during their meetings that influenced his decision to leave Penang after 26 years was the potential to establish the Centre for Civilisational Dialogue (the first of its kind in the world) which would pose an exciting intellectual challenge in a field that was dear to his heart.

More importantly were the representations which the applicant stated Professor Osman had made to him which induced him to leave USM in Penang to join UM in Kuala Lumpur. In his own words (translated from Bahasa Malaysia):

> It was always the understanding between Professor Osman (and thus the University of Malaya) and I that this was going to be a long term arrangement and, that God willing and health permitting, I would head the Centre until my retirement when I attain the age of 55 years (which would be in the year 2002). Professor Osman however informed me that the University of Malaya's internal set up was such that I would have to begin as a contract professor serving on a year to year basis. Professor Osman however assured me that this was just an administrative requirement of the University of Malaya and that it would only be a formality before I get to be confirmed as a permanent member of the academic staff of the University of Malaya. I specifically informed Professor Osman at our meetings that I had already been confirmed as permanent staff member of the University of Science Penang and therefore would not be prepared to leave a safe tenured position for any temporary or short-term arrangement.

Relying upon the assurances of Professor Osman, the applicant agreed to leave USM and to move to UM. He averred, "If not for these assurances, I would not have considered the offer of University of Malaya, conveyed to me through Professor Osman, let alone accept it".

Professor Osman in his capacity as Deputy Vice-Chancellor (Academic) on 11 December 1996 wrote a letter indicating that the Vice-Chancellor had agreed to appoint him as a "Contract Professor" for a term of one year commencing on 1 March 1997 and intimated to him that if he was interested to serve for a longer term at the Centre the Vice-Chancellor would consider an extension of the contract. The letter (translated from Bahasa Malaysia) reads:

> 11 December 1996
>
> Dr. Chandra Muzaffar
> 58, Jalan Mayang Pasir
> Bayan Baru
> 11950 Penang
>
> Sir,
>
> Appointment As Contract Professor at the Centre For Civilisational Dialogue
>
> We are pleased to inform you that the Dato' Vice Chancellor has agreed to officially establish the Centre for Civilisational Dialogue at the University of Malaya. He has also basically agreed to appoint you as Contract Professor at the Centre for a term of one year commencing 1 March 1997.
>
> If you are interested to serve a longer term at this Centre, the Vice Chancellor will consider an extension of your contract. A detailed offer letter with the list of duties planned for you will follow shortly.

> Thank you for your interest in serving with the University of Malaya. Your experience in the field of study relating to civilisation and international affairs will be a great contribution to the efforts of the University of Malaya to expand the field.
>
> Thank you.
>
> Yours truly.
>
> PROFESSOR DATO' OSMAN BAKAR
> Deputy Vice Chancellor (Academic)
>
> s.k. Dato' Dr Hj Abdullah Sanusi Ahmad Vice Chancellor
>
> En. Yaacob Hussin
> Registrar

The applicant informed Professor Osman that he was prepared to accept the position as Director of the Centre and he therefore tendered his resignation from USM and took steps to relocate to Petaling Jaya, including the selling of his house in Penang, joining UM on 1 March 1997 as the Founding Director and Professor of Civilisational Dialogue.

In regard to the offer of UM to the applicant to join UM as Professor there were affidavits filed by Professor Osman and also by the registrar of UM offering the argument that according to the Constitution of UM and the rules, regulations and statutes made thereunder the "Board of Directors" has the authority to appoint a professor upon due consideration of the recommendation of the Selection Committee and that the Vice-Chancellor is empowered to appoint professors on a contract basis for one year and that the Vice-Chancellor had offered the applicant the post of professor for one year. The applicant does not dispute the legal and administrative aspects relating to the appointment of professors.

Professor Osman also stated in para. 4(f) of his affidavit (encl. 27) that at his level he never made any offer of appointment to the applicant because he was not empowered to do so and that (see para. (g)) he never represented to the applicant at any time "that the applicant would be confirmed as a permanent employee of the respondent if he were to take up the second option" (ie, of joining UM). He continued:

> I reiterate that I informed the Applicant that the appointment of the Applicant as a full Professor at the Centre could only be made by the Vice-Chancellor of the Respondent on a contractual basis for a period of 1 year initially and thereafter, any extension of the Applicant's contract could be considered by the Vice-Chancellor of the Respondent.

But earlier in his affidavit (see para. 4(e)) Professor Osman when talking about the second option which was offered to the applicant mentioned about a longer tenure after consideration by a Selection Committee:

> (e) as a second option, the Applicant could resign from his position as an Associate Professor with USM. I could then propose to the Vice-Chancellor of the Respondent to appoint the Applicant as a full professor at the Centre on a contractual basis for an initial period of 1 year before consideration by the Selection Committee for a contract of longer tenure.

In para. 5 of his affidavit in reply (encl. 32) the applicant stated that Professor Osman informed him that "he had discussed the matter further with the Vice-Chancellor of University Malaya who, according to Professor Osman, apparently had the discretion to appoint me professor for a period of one year, but any appointment for a longer period would have to be made by a Selection Committee of the University." He continued, "It was against this background that Professor Osman informed me of the option referred to in para. 4(e) of his affidavit."

The applicant then stated in para. 6 of his affidavit:

> 6. Paragraphs 4(f) and (g) are denied. Shortly after I had taken my appointment and reported for duty I was requested to submit a list of foreign experts whom the University of Malaya was going to write to seek their opinion on whether I should be appointed professor by the Selection Committee. I supplied such a list. To the best of my knowledge the University of Malaya wrote to some of the foreign experts named in my list. I have reason to believe that the experts who were invited to comment on my qualifications and suitability gave favourable opinions ... The fact that the University took all the necessary administrative steps to formalise my appointment on a permanent basis by the Selection Committee is consistent with the facts I have set out in my affidavit.

There has been no denial that the University wrote to the foreign experts in the applicant's list for comments only that "these matters were not intended to formalise the appointment of the applicant on a permanent basis" (see further affidavit of Professor Osman, encl. 36, para. 4).

In assessing the affidavit evidence available before this court I have been guided by the principles relating to the evaluation of such evidence as enunciated in *Eng Mee Fong & Ors v. Letchumanan* [1979] 2 MLJ 212 at p. 217, *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24, *Lori Malaysia v. Arab-Malaysian Finance Berhad* [1999] 2 CLJ 997 and *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147.

I have no hesitation in accepting the very plausible version of the applicant that it was represented to him by Professor Osman that he would head the Centre until he retired although he would be appointed as a contract professor serving on a year to year basis (by the Vice-Chancellor) with the assurance from Professor Osman from UM that this was just an administrative requirement of UM and that it would only be a formality before he got to be confirmed as a permanent member of the academic staff of UM by another body of the University. Whatever the denials on legal pleas ie, that neither Professor Osman nor the Vice-Chancellor could appoint him on a permanent basis the reality is that the representations were that the applicant would have his term extended until made a permanent staff and these representations were those that could legitimately be made. In fact they are by no means extraordinary representations when someone of international stature in the academic world like the applicant is head-hunted to start up and head a department which is entirely new in concept and which would bring prestige to the University. The probabilities favour that there were such representations. I find it difficult to believe that a man happily ensconced in Penang with his family with a house of his own and deeply rooted there for over 25 years and with a permanent job with another University, *albeit* as Associate Professor, would completely uproot himself and the family, sell his house and disturb the schooling of one of his children for a mere one year's term as Professor with no prospect of continuing until being made a permanent staff It does not make sense for anyone to have acted the way he did but for the representations. There is no denial by the University that the applicant gave a list of foreign experts to whom the University could write. There was, however, a weak denial that this was not intended to formalise the appointment of the applicant on a permanent basis but there was no explanation as to why the list was required in the first place. This adds strength to the applicant's assertion that there were such representations that he would be made permanent and that his employment on a year to year contract was an administrative measure; indeed his original contract was renewed for another year and he was asked to apply and he applied for and was given staff quarters in his second year.

Admittedly the applicant has no enforceable right of being made a permanent staff of UM since there is no power of the Vice-Chancellor to do that on behalf of the University but such power is vested in another University authority and it appears that such authority had not exercised its power to appoint or not to appoint the applicant before his contract was not renewed. But at the very least the applicant had a legitimate expectation of continuing to be employed as a contract professor by the Vice-Chancellor on behalf of the University from year to year until he was

confirmed as a permanent staff member. The Vice-Chancellor on behalf of the University has a discretionary power on such appointments (and for the renewal of contracts for one year at a time). After the representations had been made to him then the applicant had a right to expect that UM would act in accordance with that representations of at least renewing his contract on a year to year basis until he became confirmed as a permanent staff member. While there is a concomitant legitimate expectation to be heard as to why the contract could not be renewed on a year to year basis until he was so confirmed, the benefit of being confirmed for another year by the Vice-Chancellor who has such power should be given unless there is an overreaching public interest against frustrating the legitimate expectation of the applicant.

On 18 February 1999 the applicant received a letter from the registrar of the University that his contract would terminate on 28 February 1999 and that his contract of service would not be renewed and that the position of Professor at the Centre would not be filled with contract officers. The letter stated the reason for the non-renewal; that the decision was based, amongst other things, on the economic factors that the University of Malaya was experiencing and on the directive from the Government that the University should optimise its existing internal resources. The affidavits of the registrar (encls. 23 and 28) repeat the reasons for the non-renewal namely that the University had experienced a reduction in the allocation of funds to facilitate the management and development of the University for the years 1998 and 1999 and that the University had received a directive from the Ministry of Education to take measures to improve the nation's economy. There was evidence that the University had not renewed the contract of several professors and lecturers but the evidence also showed that the University had renewed the contract of some of the lecturers. More importantly in our case is that the applicant, and there is no evidence to the contrary, was only the one who was given the representations that he would be continued with employment as stated earlier and as was pointed out by Lord Woolf in *Ex parte Coughlan* "most cases of an enforceable expectation of a substantive benefit ... are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract" (see 646A).

Before I comment further on the reasons advanced by the University let me deal with the contention of the applicant that the non-renewal of the contract was for a collateral reason which was political in nature. I have gone through the affidavits and it appears that reason cannot stand as it is based on a surmise and no evidence has been offered by him to justify the court making such an inference that his contract was terminated for a political reason.

My approach to the reasons advanced for the non-renewal of the contract is principally that expounded by *Ex parte Coughlan* – that the court has to see that there is a proper balance between the public interest and private interest in the light of the representations made to the applicant on which he acted to his grave detriment and the public interest arising from a directive from the Ministry of Education directing the University to optimise its internal resources and also the financial constraints on the resources of the University.

In regard to the public interest aspect the reliance by the University on economic factors which it gave was vague and unhelpful and the reference to the government directive which in reality gave its discretion on the non-renewal of contract officers (and the University in fact renewed the term of some lecturers) do not show that there was an overriding public interest for the University to renege on its representations to the applicant and to him alone that the Vice-Chancellor will continue to employ him on a year to year basis until he was placed on the permanent staff by relevant University Authority.

I am however mindful of the statutory ramifications relating to the structured approach for various authorities to make various appointments on behalf of the University within UM; that only the Vice-Chancellor has only the power to appoint (and therefore renew) the contract of a professor for one year at a time. The applicant served two years in the University from 1 March 1997 to 28 February 1999. There is no evidence of the applicant's case having been considered by the relevant authority for permanent placement under the law. The retirement age for a permanent staff in the University of Malaya is 55 years and the applicant had only three years left before reaching the age of 55. It is difficult for the court to gauge when the relevant authority which has the statutory authority to place him on a permanent basis would meet or what its decision would be but in all fairness in view of the legitimate expectation of the applicant he should have been continued in employment for another year at the least as that was within the power of the Vice-Chancellor on behalf of the University to give him until his appointment as permanent professor was confirmed or rejected by the relevant authority of the University.

Consequential Relief

I now have to address the question of what relief should be given to the applicant. In the leave application which was granted by my learned brother Azmel J there was a prayer for reinstatement. There was also an alternative prayer for "the appropriate order" under para. 1 of the Schedule to the Courts of Judicature Act 1964 (CJA) and s. 25 thereof.

That the applicant cannot be reinstated will be apparent from the later part of my decision. That the applicant may obtain an "appropriate" relief is to my mind beyond question (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771).

The applicant is pursuing monetary compensation for three years from 1 March 1999 to the date of his retirement in 2002 and predicates the relief sought on principles enunciated in the majority decision of the Federal Court in *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147 that the jurisdiction of Malaysian Courts to grant any of the prerogative orders flow not only from the prerogative jurisdiction inherited from the United Kingdom courts but also from the provisions of para. 1 of the Schedule and the Courts of Judicature Act 1964 and s. 25 thereof and that neither the proviso to s. 25(2) nor O. 53 (before its amendment in 2000) of the Rules of the High Court 1980 can constitute an impediment to the court's reliance on para. 1 of the Schedule to the said Act. By a majority the Federal Court held that in appropriate cases the High Court has the power not merely to quash the award of the Industrial Court but to proceed to find that an employee has been dismissed from service without just cause or excuse, and when necessary, to award fair compensation. Edgar Joseph Jr. FCJ had this to say at p. 183:

> Having regard to the breadth of the provisions of para 1 of the Schedule to the Courts of Judicature Act 1964, it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions. ... The need for such a wider power is illustrated by the case of *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155 where the House of Lords was struggling to mould the remedy to suit the justice of the case. In the event, the House granted a declaration to protect the probationary constable financially for the Chief Constable's breach of the rules of natural justice.
>
> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.

In any event the procedure in O. 53 was amended when the whole of O. 53 was substituted by the Rules of the High Court (Amendment) 2000 (PU(A)342/2000) on 21 September 2000. Presently, O. 53 r. 2(3) provides that upon "the hearing of an application for judicial review the court shall

not be confined to the relief claimed by the applicant but may dismiss the application or make any orders including an order of injunction or monetary compensation ...".

An affidavit (encl. 38) filed on 30 August 2000 on behalf of the applicant shows that the applicant was earning the sum of RM9,600 on a monthly basis made up of a basic salary of RM5,470 and allowance for "entertainment" (RM2,150) and "housing" (RM1,300) and for being in "special grade" (RM500). The applicant also claims the monthly contribution to the Provident Fund (EPF) by the University. An affidavit (encl. 38A) filed on 30 September 2000 on behalf of the University does not dispute the amounts paid on a monthly basis but disputes that he is entitled to them after his contract was not renewed.

I am mindful that this is not a case of unfair dismissal. The applicant expected to be a member of the permanent staff but as explained earlier that expectation cannot be fulfilled because the power to emplace him on a permanent basis has not been exercised by the relevant authority. That legitimate expectation cannot be fulfilled and cannot be enforced. So it cannot form the basis for a monetary claim till the date he retires. It was a year to year contract which was renewable by the University through the Vice-Chancellor and in fact his term had been renewed earlier by the Vice-Chancellor and what subsequently took place was that he had been denied the legitimate expectation of being continued in service for another year as was explained earlier. It would be fair and just to compensate him for that one year which he had expected and what was not given to him. I would award him compensation of RM115,000 for one year (ie, RM9,600 x 12 months), the University's monthly contribution to EPF for 12 months and interest of 8% on the sum of RM115,000 from 1 March 1999 to date of payment.

In the result *certiorari* to issue to quash the decision of UM not to renew the contract of the applicant. Compensation of RM115,000 for one year and interest at 8% on the said sum from 1 March 1999 to date of payment. The University is to pay the costs of the application.